No. 4355

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CHARLES FORNI,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

PETITION FOR REHEARING

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To the Honorable, The Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

This is a petition for rehearing on behalf of plaintiff in error, Charles Forni, after decision of this court, by a divided opinion, affirming the judgment of the District Court convicting plaintiff in error on the two counts of unlawful possession of intoxicating liquor and maintaining a common nuisance by keeping the same liquor for sale.

Two major grounds of error were advanced in the Briefs and in the argument as requiring a reversal of

the judgment. Our position was that the only evidence at the trial in support of either count was evidence describing liquor seized under a search warrant theretofore issued. The liquor seized was found in a private garage underneath the private dwelling of plaintiff in error and in a shed in the rear of his house, all of the same being surrounded by a common enclosure and actually and in good faith having been at the time and for several years prior thereto his residence. We maintained that the garage and shed under the facts disclosed constituted a part of the dwelling which under Sec. 25 of Title 2 of the National Prohibition Act were immune from search except under a search warrant issued upon an affidavit charging and supported by facts reasonably warranting the belief that the premises were being used for the purpose of an unlawful sale of liquor therein. The whole argument below and heretofore in this court turned on the two questions whether the shed and garage were within the immunity from search accorded to a "dwelling house" and whether the affidavit contained facts alleging and reasonably substantiating the charge of *sale* therein.

In our Brief (pp. 15 to 19) we set out the authorities supporting the view that the shed and garage constituted a part of the private dwelling; which authorities were not questioned by the Government in its reply.

That there was in fact no sale on the premises is directly sworn to by plaintiff in error in his affidavit in

support of the petition for a return of personal property

> "That said premises were never used in whole or in part for any business purpose and that no sale of intoxicating liquors was ever made therein." (Tr. p. 27, 28.)

and the only witness for the Government at the trial testified

> "This is a dwelling house with a garage underneath and with outhouses, which were all enclosed with a fence . . . I saw no liquor being sold there." (Tr. p. 69.)

As respects the question of sale we likewise set out, in full, numerous cases, all in terms holding that the affidavit, to be sufficient, must contain not hearsay, surmises or conclusions of the affiant, but definite facts on the basis of which the commissioner issuing the warrant might reasonably determine that a violation of the law was being committed, which violation, where the search warrant was for the purpose of entering a private dwelling, must be a *sale* of liquor. The pertinent part of the affidavit under attack is

> "That affiant has been informed that liquors are taken to and from said garage both night and day; that affiant has reason to believe from said information and from inspection of the said garage that liquors in excess of ½% alcohol illegally acquired are stored and traded in from this garage." (Tr. p. 50.)

As to that part of this affidavit based on information and belief, no question of its insufficiency to justify a search can be made, and this court in its opinion so declares. That from inspection, the presence of liquor could be determined we may concede for the moment, waiving the impossibility of determining from mere distant inspection the intoxicating nature of liquor. But we earnestly urge that the averment

> "that affiant had reason to believe . . . from inspection of said garage that liquors in excess of ½% alcohol illegally acquired are . . . traded in from this garage."

does not contain a single *fact* sufficient to constitute the proof of a *sale* which under the law is prerequisite. No substantial answer was made to this claim by the Government, either in its Brief or in the argument.

However, this court, in its opinion, apparently did not find it necessary to determine whether the shed and garage were a part of the dwelling house or whether there was a proof of sale because it considered that the *storage* of the liquor seized, in and of itself, was a use of a private dwelling for a business purpose which under the same Sec. 25 of Title 2 of the National Prohibition Act removed it from the protection which we claim.

The whole claim of the Government at the trial and in the affidavits previously filed, was that the *private dwelling* of plaintiff in error had never been entered or searched. It was never seriously argued, nor in the passing comment in the Government's Brief is

there cited a single case in support of the theory adopted by this court as determinative of the case. In holding that the mere possession of illicit liquor in a private dwelling, *bona fide* occupied as such, constitutes a "business use" as contemplated by Sec. 25 of the National Prohibition Act we respectfully submit that this court has misconstructed and nullified its meaning and purpose.

The language of the Act in question is as follows:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house." (Sec. 25, Title 2, N. P. A.)

That the premises were a dwelling house was demonstrated both by the affidavit of plaintiff in error and the testimony of the Government witness himself, as hereinabove set forth. The requirement that the private dwelling must be "occupied as such" was intended to cover the situation where an individual, for the sole purpose of evading the law, occupied or slept in business premises with the purpose of thereafter in bad faith claiming that they constituted his private dwelling. The facts of the instant case, as disclosed by undisputed evidence (Tr. p. 70), are that plaintiff in error, his sister and brother occupied the premises in good faith as a private dwelling for years prior to the search in question and that it was their actual and

only place of abode. Hence there can be no question that the premises searched constituted the private dwelling occupied as such.

That it was not used for the unlawful *sale* of intoxicating liquor appears from the evidence and likewise the affidavit wholly fails to charge a sale or to contain the necessary facts to support such a charge. Was it

> "in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house"?

We respectfully submit that the only situation contemplated by this provision is one wherein the proximity of the place of business to the residence or the use of the residence for the business purposes specified in the Act is such that the invitation to the public to transact business would be a mere pretext or blind to cover illegal traffic in liquor. The business itself contemplated by the Act is one which, nominally at least, would be legal, and for the purpose of transacting which the public could freely and openly come and go. It was never intended that the business itself would be *the* illegal acts proscribed by the Prohibition Act. While it is not necessary to contend that in any event it is only *the* businesses listed in the statute, and none other, which will deprive a dwelling of its protection, (as the cases in fact do hold), nevertheless each of the business purposes listed in the statute has in common the dominant characteristic that it is a place open to

the public, and is, nominally, a legitimate and legal pursuit.

If Congress intended the mere possession of liquor in a private dwelling (and, after all, calling the "possession" of liquor "storage" of liquor, does not change the actual situation) to constitute a *business* use, there would have been no point in its language forbidding the search of a private dwelling except on proof of a sale. If the reasoning of this court is sound that because the mere possession of liquor raises the presumption of its possession for the purpose of unlawful sale, etc., and that is a *business* use, then an affidavit charging the possession of any liquor in any private dwelling would be *prima facie* sufficient to support the issuance of a warrant, and a search and seizure. There is no escape from this conclusion. Nowhere in the Act or in the decisions is any weight ascribed to, or any limitation imposed upon, the quantity of liquor which may be possessed in a private dwelling, or to the presence or absence of revenue stamps. To hold that the mere proof of possession in a private dwelling *prima facie* raises the presumption of illegal possession for the purpose of sales and that the same thereby constitutes a business purpose, justifying a search and seizure, renders practically meaningless the statutory protection intended to surround a private dwelling from search except on proof of a *sale*.

The question whether mere possession of liquor in a private home may, by being termed "storage," consti-

tute it a business use of the premises, does not seem to have been directly considered by the courts. The Federal Courts, however, have very definitely held that although a home is being used for the purpose of illicit manufacturing of liquor for commercial purposes, nevertheless the premises cannot be searched because under the Act it is only where a private dwelling is used for unlawful sale or for one of the business purposes specified that a search warrant may issue.

We desire to call this court's attention without further argument to the following Federal cases not heretofore cited in this connection and which have in terms considered this question. The brief excerpts set forth below will indicate the facts of the cases as well as the holding of the court.

U. S. vs. *Kelih,* 272 Fed., 484, (D. C., Ill.).

"The defendant in this case has resided in the premises in question for some time. There was nothing in the evidence to show that the premises were used as anything other than a private dwelling. In fact, the court finds that the premises in question were the private dwelling of the defendant and his family. It is not claimed that defendant's private dwelling was being used for the illegal sale of intoxicating liquor. Nor is it claimed that it was being used in part for any business purpose such as a store, shop, saloon, restaurant, hotel or boarding house. However, the contention is made that, because the evidence procured upon the unlawful search discloses a home-made still in operation, the premises ceased to be a private dwelling and became a distillery. It would be equally as sound to contend that if defendant had had a sau-

sage mill in his kitchen, which his wife used occasionally, that would change the character of the dwelling to that of a packing house. If Sec. 25 *supra,* had used the words 'Unless it is being used for the unlawful SALE OR MANUFACTURE of intoxicating liquor' a different situation would arise; but the statute does not use the capitalized words and limits the business purpose to such use as a 'store, shop, saloon, restaurant, hotel, or boarding house.' And there is now and was then no evidence to support the contention that the premises were used in part for any of the specific excepted purposes set out in the statute."

On a parity of reasoning we urge that the statute does not declare that an unlawful sale *or possession* in a private dwelling will authorize its invasion.

So in *Armstrong* vs. *U. S.* 275 Fed. 506, the court says:

"The Congress left no doubt in the mind of one reading the Act that, when a search warrant was applied for to search a private dwelling, something more must be stated than for a store or other place of business. A man's private dwelling, being his castle, should not be invaded, except and unless it was being used for the unlawful sale of intoxicating liquor, or unless it was being partly used for one or more of the businesses mentioned in the quotation above; and these facts must appear in the affidavit, or such facts be contained therein as will raise in the mind of the officer issuing the warrant a reasonable ground to believe such fact exists . . . ."

So also in *U. S.* vs. *Jajewswiec,* 285 Fed. 789, (D. C. Mass.), it is said:

> "It is contended by the Government that the warrant could lawfully issue, if the facts supported by oath justified the magistrate issuing the warrant in concluding that there was probable cause to believe that the dwelling was in part used for the business of *manufacturing liquor.* To adopt this contention is to extend by implication the right to search dwellings beyond the express limitation of the Act.
>
> (Here follows the quotation from *U. S.* vs. *Kelih* hereinabove set forth.)
>
> The construction of the court in this case would seem to be the proper construction to be placed upon the provision of the Act. If Congress had intended to extend the right to search dwelling houses used in part for any business, or even for the unlawful business of manufacturing intoxicating liquors, it could have easily so provided . . . .
>
> As the affidavit and warrant failed to disclose any evidence tending to show that the defendant's dwelling house was being used for the unlawful sale of intoxicating liquor, or was used in part as a store, shop, saloon, restaurant, hotel or boarding house, the court is of the opinion that the search warrant was void and the search made upon it illegal and unlawful."

The Circuit Court of Appeals for the Seventh Circuit specifically considered this question in the case of *Joswich* vs. *U. S.,* 288 Fed. 831, where the affidavit charged that illicit liquor was being manufactured on the premises and in a house located on the rear part of

the lot at ————, being the premises of Joe Joswich, the court saying:

> "The manufacture of illicit liquor in a house does not bring the case within the language of the statute . . .
>
> It is apparent from a reading of this section (Sec. 25) that the Congress had in mind the distinction which has always existed (so far as search is concerned) between a dwelling house and a place of business. Since the time of Otis, back in Colonial days, the dwelling house, occupied as such, has been recognized as the owner's 'castle' and has not been the legitimate object of raids by Government officials, unless the showing made before the commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business.
>
> Under this Section the informant must show to the commissioner that the place to be searched was being used (a) for the unlawful sale of intoxicating liquor (in which case a private residence may be searched) or, (b) it must be shown that the place to be searched is 'not a private residence used as such', or if it is a residence it is 'in part used for some business purpose such as a store, shop, saloon, restaurant, hotel or boarding house'.
>
> The affidavit here under review does not charge defendant with having unlawfully *sold* intoxicating liquors, and it was therefore necessary for the informant to convince the commissioner that there was probable cause to believe that the premises to be searched (in this case, the defendant's 'house') were used in part for some business purpose such as 'a store, shop, saloon, restaurant, hotel or boarding house'. An essential fact not having been dis-

closed, the affidavit was insufficient to support the issuance of a warrant, and the evidence seized was improperly used upon the trial."

Finally the District Court of Massachusetts considered this question at length in the recent case of *U. S.* vs. *Palma,* 295 Fed. 149, where the affidavit read:

"I also have reason to believe and do believe and this is a matter of common report that liquor for commercial purposes is being manufactured in said premises."

We take the liberty of setting out in full the language of the court because it considers the various cases heretofore reported on the subject and lays down what in our opinion is the proper interpretation of the intention of Congress and the proper definition of the language of the statute:

"In *U. S.* vs. *Jajewsweic,* 285 Fed. 789, this court held that Sec. 25 of Title 2 of the National Prohibition Act (41 Stats. 315 (Comp. St. Ann. Supp. 1923, Sec. 10138½ m)) did not authorize a magistrate, upon evidence of manufacturing only, to issue a warrant for the search of a dwelling house which was not used in part for the purposes enumerated in the Section. The same conclusion has been reached in other jurisdictions. *U. S.* vs. *Kelih* (D. C.) 272 Fed. 484; *Joswich* vs. *U. S.* (C. C. A.) 288 Fed. 831. . . . I come to the broader and more important aspect, namely, the question whether the rule in the above cases is to be limited to private dwellings where liquor is being manufactured on a small scale, and not for commercial purposes. This is the contention of the Govern-

ment, and it is apparently based upon the theory that a dwelling house ceases to be a private dwelling, and is no longer entitled to the protection of Sec. 25 of National Prohibition Act, if any part of it (e. g. the cellar or the attic) is being devoted to the unlawful manufacturing of liquor on such a scale as to justify the magistrate in believing that it was being manufactured for ultimate sale. If this theory can be supported at all, it must be on one of two grounds:

First: That the dwelling was used in part for 'some business purpose' within the meaning of this section; or

Second: That it was being used in part for a 'shop' . . .

It seems to me that the legislative intent, as expressed in Section 25, is clear. The right to search for liquor was not to be extended to a private dwelling, unless it appeared that the dwelling house was used for the unlawful sale of intoxicating liquor, or unless it was in part used for some of the business purposes ennunciated in the act . . . The private dwelling must be used in part for a 'business purpose such as a store, shop, saloon, restaurant, hotel or boarding house,' all places where, as the experience of pre-prohibition days indicates, liquor might be sold, not places where it might be manufactured.

I can find no definition of the word 'shop' which could reasonably be held to include a distillery or a brewery, where ordinarily the business or manufacturing of intoxicating liquors is carried on, nor do I find in any reported case any decision supporting the proposition that, if a still is found in a private dwelling, the dwelling is being used for a shop. I am unable to adopt the view that, because a man sees fit to carry on an unlawful enterprise in his house, he thereby destroys the character of his

house as his dwelling place. As has been frequently pointed out in the cases arising under the Prohibition Act, the search warrant is the most drastic instrument which can be placed in the hands of an officer, and, when legislation is enacted extending the right to search and seizure in private dwellings, the courts ought not lend their sanction to any interpretation of this legislation which will extend the right beyond the clear and obvious intent thereof.

When application is made for a warrant to search a dwelling house which is not used for any of the business purposes enumerated in the act, it seems to me the proper question for the magistrate to consider is whether the building is occupied in good faith as his home by the party whose premises are to be searched. If it should appear that the dwelling house was not being used as a *bona fide* place of abode, but merely as a cover for illegal manufacture, a different situation would be presented."

A contrary view has been expressed in *In Re Mobile,* 278 Fed. 149.

In every other case wherein a private dwelling has been searched, either with or without a warrant, the business purpose justifying the search was either one actually specified in the Act, that is, a saloon (*U. S.* vs. *Crossen,* 264 Fed. 459; *U. S.* vs. *Magg,* 287 Fed. 356; *U. S.* vs. *McGuire,* 300 Fed. 98); a hotel (*U. S.* vs. *Masters,* 267 Fed. 581); a soft drink parlor (*Kathriner* vs. *U. S.,* 276 Fed. 808); or, as in *U. S.* vs. *Lepper,* 288 Fed. 136, a private dwelling where there was such additional evidence as the noise of bottles, movement of wooden cases in and out of the building, load-

ing of trucks and machines at the curb and a constant stream of visitors, the whole transaction occurring with an air of secrecy, all of which reasonably warranted a belief that liquor was being sold therein. In every one of these cases the public had direct and unrestricted access to the premises searched and some legitimate business purpose was served therein as a cloak for or as an auxiliary to the unlawful sale of liquor. On the contrary, in each of the Federal cases cited in support of our contention, the private dwellings, while perhaps used for an illegal purpose, confined the illegality to its own walls and no intercourse with the public was proved or charged.

The same question involved here has been considered in some of the States where the law prohibited the possession of liquor in a place of business but permitted it under restrictions in private dwellings. Thus in *Brooks* vs. *State,* 90 S. E. (Ga.) 989, the court said:

> "I charge you that by 'place of business' is meant public place of business; not public in the sense that it belongs to the public; not public in the sense that it must be done with any degree of publicity; but it must be a place to which the public is invited, either expressly or by implication to come for the purpose of trading or transacting business; and a place of that character to which the public is invited, where business is carried on, is a public place of business. It makes no difference whether the amount of business be great or small. By 'public' is meant that the public is invited to it and has access to it for the purpose within the scope of the business that is carried on."

See also *Jenkins* vs. *State,* 62 S. E. (Ga.) 574, where the court said:

> "One of the notions in the legislative mind was that to allow persons to keep liquors at their places of business would afford them the opportunity of using liquor to induce trade—a thing already forbidden by law. Another notion, we infer, was that the maintenance of an apparently legitimate business might be used as a cloak to conceal the carrying on of an unlawful traffic in liquors."

Particularly pertinent is the case of *Roberts* vs. *State,* 60 S. E. (Ga.) 1082, where the following appears:

> "The reasonable, common sense construction giving to the words their usual and popular significance is that a 'place of business', as used in the prohibition statute, means a place where the public generally are expressly or impliedly invited for the purpose of transacting business with the owner, and that a mere storeroom, to which the public is not invited, and from which the public is excluded, is in no sense a place of business within the meaning of the phrase, 'place of business' as used in the prohibition statute."

It cannot be seriously contended that plaintiff in error's premises were used as a shop, saloon, restaurant, hotel or boarding house, nor properly can it be termed a store. The mere fact that liquor was "stored" does not under any rational construction constitute a private dwelling a store. If that were so every dwelling containing liquor in any quantity,

without proof of sale, transportation or manufacture, must be a place of business even though the possession was for the exclusive personal use of the owner. The possibility that liquor might be sold would take the place of the proof of sale required by the Act. It would be of little assistance to this court to quote from or cite cases defining the word "store." Suffice it to refer to the exhaustive consideration of this question in Ann. Cas., 1913 E. at p. 1125, where numerous cases are cited which substantially agree in defining a store as a place where articles are bought and sold and are distinguished by the common and dominant characteristic of being open to the public.

We respectfully insist that the fact that plaintiff in error by *subsequent* affidavit and petition alleged that he owned the liquor seized and that from his description it appeared that it was intoxicating liquor, or that at the trial evidence may have been adduced which indicated that the liquor was illicit, must be disregarded by this court in its determination as to the *original validity* of the search warrant. No rule is more firmly established than that an illegal search can never be justified by successful results. If this were not so, no successful raid would be illegal. This fundamental principle has found expression by the courts many times, typical of which is the following:

U. S. vs. *Casino,* 281 Fed. 976:

> "The respondent argues that the petitioner's present assertion of ownership makes up any deficiency in the proof. So it does, but it cannot be used. If

> the petitioner had suffered a wrong, because his close had been violated and his chattels seized, it is not material that, to obtain redress, he is forced to disclose that he was guilty of a crime, nor does it make any difference that the facts so disclosed, if known to and stated by the prohibition agents, would have made the search and seizure legal. The constitution protects the guilty along with the innocent, for reasons deemed sufficient, into which I need not inquire. It means to prevent violent entries till evidence is obtained independently of the entries themselves, or of the admission involved in seeking redress for wrongs done. Were it not so, all seizures would be legal which turned out successful."

Finally, in this connection we suggest that if the interpretation of this court is correct the language of the statute becomes meaningless. There would be no point in declaring that a private dwelling could not be searched on a charge involving the violation of the Prohibition Act unless upon proof of *sale* of liquor therein, or unless it is being used for a business purpose, if every other violation of the Prohibition Act (i. e., unlawful possession or manufacture of liquor therein, or any other act denounced by this statute) would automatically constitute a partial use of the home for a business purpose. The obvious intent was that even though certain violations of the Prohibition law occurred in a private dwelling, no search could be made. Congress apparently was satisfied that for illegal transportation, or possession, or manufacture, of liquor, the private dwelling of the offender could

not be searched. As long as these violations of the statute were confined to the premises it was felt that the injury to the public generally was not sufficiently grave to warrant the invasion of his home with all the possibilities for injury and injustice which that might entail. The interpretation of this court which in effect considers illegal possession in a dwelling house as identical with its use for a business purpose warranting search and seizure, does violence to the undoubted intention of Congress.

Aside from the foregoing contention we again respectfully point out to this court that the search warrant does not pretend even on the basis of hearsay information to charge any illegal act as having occurred in the *shed* in the rear of the premises. It will be noticed that the affidavit in its statement of fact limits the illegal acts to the *garage* and fails absolutely to make any reference either as to the intoxicating nature of the liquor or its illicit origin or its illicit use except as respects the contents of the garage. For this reason likewise even under the theory of this court the search as respects the shed, as distinguished from the garage, was wholly unwarranted and to that extent at least the evidence was improperly admitted at the trial.

Our other main ground for reversal, to-wit: The admission over objection of evidence as to previous *arrests* of the plaintiff in error, this court dismisses upon the ground that even if error were committed, it was harmless in view of the fact that the possession of

the liquor was definitely established and the presumption of illegality raised by the statute was not overcome by any part of the testimony. Conceding for the moment that the search was legal and the evidence, therefore, admissible at the trial, it is true that no injury was done this plaintiff in error insofar as the charge against him was merely the unlawful possession of liquor. But in view of the fact that there was absolutely no other evidence to support the charge of maintaining a common nuisance, we earnestly urge that such evidence of arrest, repeated over objection and drawn out again by voluntary questions of the court and reiterated in its charge to the jury that they might take into consideration the fact, if they found it to be a fact, that the plaintiff in error had been *arrested* before as bootlegger, must have influenced the jury in finding a verdict of guilty on the nuisance charge. We pointed out in the opening brief that while a single sale of liquor might support a conviction of maintaining a nuisance, that was the extreme limit to which the decisions had gone, and that in this case the only evidence before the jury in support of either count was proof of mere possession of liquor. We feel that it needed only this additional suggestion of numerous previous arrests, without the slightest proof that the arrests were warranted or had resulted in convictions to turn the minds of the jury against this plaintiff in error on the nuisance charge and to that extent, at least, we feel that if there was error in the admission of the testimony, it must have been prejudicial.

For the foregoing reasons and particularly in view of the fact that this decision, rendered by a divided court, turns on an issue not heretofore fully discussed, or considered vital, we respectfully request that a rehearing be granted.

Dated, San Francisco, January 29, 1925.

Respectfully submitted,

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Of Counsel.

I hereby certify that I am one of the attorneys for the Plaintiff in Error; that in my opinion the foregoing Petition for Rehearing is well taken in point of law and that the same is not interposed for the purpose of delay.

H. S. YOUNG.